SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No.

BYRON THORNHILL,

Petitioner,

vs.

THE STATE OF ALABAMA.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA AND BRIEF IN SUPPORT THEREOF.

JAMES J. MAYFIELD,
Counsel for Petitioner.

JOSEPH A. PADWAY,
Of Counsel for Petitioner,
321 Tower Building,
Washington, D. C.

INDEX.

Subject Index.

	Page
Petition for a writ of certiorari	1
Summary statement of the matter involved	1
Statement as to jurisdiction	3
I. Federal statute involved	2
II. Ruling of the courts below	5
Questions presented	7
Reasons relied on for certiorari	7
Prayer for writ	7
Brief in support of petition for writ of certiorari	9
I. The opinions of the courts below	9
II. Jurisdiction	9
III. Statement of the case	11
IV. Errors assigned	12
V. Argument	12
Point I. Statute violates XIVth Amendment Federal Constitution	12
Point II. Petitioner's conviction was without due process of law	16
Summary and conclusion	18

Appendices.

"A"—*Byron Thornhill* v. *The State*	19
"B"—*O'Rouke* v. *City of Birmingham*, 168 So. 206, 27 Ala. App. 133	20
"C"—*Hardie-Tynes* v. *Cruise*, 189 Ala. 66, 66 So. 657	23

Table of Cases Cited.

C. I. O. v. *Hague*, 59 S. Ct. 954	4, 11
De Jonge v. *Oregon*, 299 U. S. 363	16
Hardie-Tynes v. *Cruise*, 189 Ala. 66, 66 So. 657	2, 11, 13
Herndon v. *Lowry*, 301 U. S. 242	14
Lovell v. *Griffin*, 303 U. S. 444	4, 11

Page

O'Rouke v. *City of Birmingham*, 168 So. 206, 27 Ala. App. 133 ..... 2, 6, 11
People v. *Harris*, 91 Pacific (2d) 993 12
Schenck v. *United States*, 249 U. S. 47, at page 52 14
Senn v. *Tile Layers Union*, 57 S. Ct. at page 867, 81 L. Ed. 1229 13
State v. *Byron Thornhill* 1
Whitney v. *California*, 274 U. S. 357 at 377 18
Zutch v. *King*, 260 U. S. 174, 176 4

Table of Statutes Cited.

Section 3448, Code of Alabama, 1923, Volume 2, page 98 ..... 3, 10
XIVth Amendment to Constitution 2, 4
Act of Congress of February 13, 1935, Section 237-b, 28 U. S. C. A. 344, page 205 ..... 3, 9
Section 3238, Code of Alabama, 1923, Volume 2, page 31 5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No.

BYRON THORNHILL,

Petitioner,

vs.

THE STATE OF ALABAMA.

PETITION FOR WRIT OF CERTIORARI.

May it Please the Court:

The petition of Byron Thornhill respectfully shows to this Honorable Court:

A.

Summary Statement of Matter Involved.

1. Byron Thornhill, your petitioner, was president of Local #19974, Creosoters Union, affiliated with the American Federation of Labor. The Brown Wood Preserving Company, Inc., operated a creosoting plant in Tuscaloosa County, Alabama, and employed approximately 100 men including the petitioner. 94 of these men belonged to said

local union. The Creosoters Local Union went out on strike and placed pickets at the entrances to the Company's plant. One Clarence Simpson, an employee of the Company, but not a member of the union, started to return to work at the creosoting plant. The petitioner went up to Simpson and requested him in a peaceable manner, without show of force, direct or implied, not to "go up there" (referring to the plant of the Brown Wood Preserving Company) until the strike was settled. Simpson then voluntarily retired from the vicinity of the plant (R. 9-13).

2. The petitioner was arrested for this action and prosecuted under an Alabama Statute, hereinafter set out, making "picketing and loitering" in a labor dispute a criminal offense.

3. The petitioner resisted prosecution in all the Alabama Courts, on the grounds that the Statute under which he was prosecuted was repugnant to the *XIVth Amendment to the Constitution of the United States* in that it deprived him of freedom of speech and assemblage, and that the court by extending the purview of the Statute of the petitioner's actions on the occasion in question, deprived him of the protection of the due-process clause of said amendment.

4. The Court of Appeals of Alabama affirmed the petitioner's conviction under authority of the cases of *Hardie-Tynes* v. *Cruse*, 189 Ala. 66, 66 So. 657 (Appendix "C" this petition) and *O'Rouke* v. *Birmingham*, 168 So. 206, 27 Ala. App. 133 (Appendix "B"), which cases expressly held that the anti-picketing statute here challenged did not violate the *XIVth Amendment to the United States Constitution;* and held that the petitioner's actions on the occasion in question were within the purview of the prohibition implied in the statute.

B.

Statement as to Jurisdiction.

(a) This Court has jurisdiction to grant the relief prayed, because this is a case wherein was drawn in question the validity and constitutionality of a Statute of the State of Alabama, and the operation thereof, as being repugnant to a provision of the Constitution of the United States. The decision of the highest court of Alabama in which a decision could be had, was in favor of the validity of said Statute and its operation.

2. The *Act of Congress of February 13th, 1935, Section 237 b, 28 U. S. C. A. 344, page 205,* gives jurisdiction to this Court, "to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question—the validity of a statute of any State on the grounds of its being repugnant to the Constitution, treaties, or laws of the United States".

(b) The statute, the validity of which is here drawn into question, is Alabama's anti-picketing law: *Section 3448, Code of Alabama, 1923. Volume 2, Page 98, official edition.*

> LOITERING AND PICKETING FORBIDDEN.—Any person or persons, who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket

the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business."

(c) 1. The judgment which petitioner prays this Court to review was rendered by the Court of Appeals of Alabama, on January 7th, 1939. That court denied petitioner's motion for rehearing in this cause on May 23rd, 1939 (R. 18). The Supreme Court of Alabama denied the petitioner's petition for a writ of certiorari on June 15th, 1939 (R. 22). On September 12th, 1939, Mr. Justice Hugo L. Black, by appropriate order extended the time for filing of this petition until November 12th, 1939 (R. 24).

2. The decision of the Court of Appeals in this cause appears at *189 So. 913*, certiorari denied by Supreme Court, *189 So. 914, July 20th, 1939, Advance Sheet*, (Appendix "A") this petition.

3. In this case it is contended that Alabama's anti-picketing statute, *Section 3448, Code of 1923, supra*, deprives the petitioner of his guarantees of freedom of speech and assemblage, and that the application of the statute to him violates the due-process clause of the *XIVth Amendment to the Constitution of the United States*. The cases below, among others, are authority for the proposition that freedom of speech and assemblage are protected by the *XIVth Amendment*.

Lovell v. *Griffin*, 303 U. S. 444;
C. I. O. v. *Hague*, 59 S. Ct. 954.

4. The constitutional questions raised are serious and not frivolous.

Zutch v. *King*, 260 U. S. 174, 176;
Lovell v. *Griffin, supra.*

The purpose of the petitioner is to show that the statute here questioned is not a valid exercise of the police power of the State of Alabama, but is in effect an unauthorized assumption of despotic authority, for the purpose of suppressing free speech and assemblage, and preventing collective action by workers to better their working conditions.

Rulings of the Alabama Courts.

5. In the Inferior Court of Tuscaloosa County, Alabama, the petitioner filed demurrers (R. 3) to the affidavit and warrant (R. 1), charging that *Section 3448, supra,* was violative of the due-process clause of the *XIVth Amendment, supra,* and specifically that his constitutionally guaranteed rights of freedom of speech and assemblage were impugned by said statute. Petitioner was convicted of "picketing and loitering" and fined $100 and costs (R. 5).

In the Circuit Court of Tuscaloosa County, a trial *de novo* was had and the petitioner refiled the said demurrers (R. 6) to the complaint of the State (R. 5). Petitioner further made a timely motion to exclude the State's evidence on the ground "that the Statute under which the petitioner is being prosecuted is violative of the Constitution of the United States." This motion was denied and petitioner duly reserved exception (R. 13). He was here convicted of "picketing and loitering" and fined $100 and costs.

The Court of Appeals of Alabama affirmed the conviction of the Circuit Court (R. 22). It will be noted that in criminal cases it is the duty of the Court of Appeals to examine the whole record without specific assignment of error, *Section 3258, Code of Alabama, 1923.* The court considered the Federal right in its opinion:

> "the only question involved in this appeal is the constitutionality *vel non* of Section 3448", *supra* (R. 16).

and

> "It seems clear that the evidence adduced upon the trial was sufficient to bring appellant's actions, for which he is being prosecuted, within the purview of the prohibition implied in the statute."

The Court of Appeals held that it was bound by two former Supreme Court decisions: *O'Rouke* v. *Birmingham*, 27 Ala. App. 133, 168 So. 206, certiorari denied 168 So. 209, and *Hardie-Tynes* v. *Cruise*, 189 Ala. 66, 66 So. 657 (R. 17), and affirmed this case under the authority of these decisions. (The Alabama Court of Appeals is bound by decisions of Supreme Court on constitutional questions, *Section 7318, Code of Alabama, 1923.*) Therefore the pertinent portions of these cases are attached herewith as Appendix "B" and "C" in conformity with Rule 12, Section 1, Paragraph 4, Rules of this Court.

The Court of Appeals denied a motion for rehearing (R. 18).

The petitioner prayed a writ of certiorari of the Supreme Court of Alabama to the Court of Appeals (R. 20) and made, among others, the following assignments:

> "4. That the Court of Appeals erred in attempting to extend the purview of *Section 3448 of the Code of Alabama, 1923*, to the petitioner and the facts at bar."

> "5. That the Court of Appeals erred in holding that *Section 3448 of the Code of Alabama, 1923*, was not violative of the *XIVth Amendment to the Constitution of the United States.*"

> "7. That the Court of Appeals erred in holding that *Section 3448 of the Code of Alabama, 1923*, was not violative of the due-process clause of the Constitution of the United States."

> "8. That the Court of Appeals erred in holding that *Section 3448 of the Code of Alabama, 1923*, was not violative of the Constitution of the United States."

The Supreme Court denied certiorari (R. 22).

The petitioner avers that the demurrers, motion, and assignments of error, set out in this section were sufficient to raise a Federal question and bring this case within the jurisdiction statute, heretofore set out.

The Questions Presented.

The questions here brought forward are:

1. Whether or not Alabama's anti-picketing law, *Section 3448, supra;* is violative of the *XIVth Amendment to the Constitution of the United States* in that it deprives the petitioner of freedom of speech and assemblage.

2. Whether or not the Alabama courts deprived the petitioner of the protection of the due-process of law clause of the *XIVth Amendment, supra,* by holding that petitioner's actions on the occasion in question, were within the purview of the prohibition implied in the statute; i.e. *Section 3448, supra.*

Reasons Relied on for Allowance of Writ.

1. The Court of Appeals of Alabama has decided a Federal question of substance not heretofore determined by this Court, or has decided it in a way not in accord with the applicable decisions of this Court. *Supreme Court Rule 38, Section 5 a.*

A copy of the entire record in this case, as certified to be true and correct, by the Clerk of the Court of Appeals, and the Clerk of the Supreme Court of Alabama, is hereby furnished, attached to, and made a part of this application in compliance with *Rule 38, Paragraph 1,* of the Rules of this Court.

WHEREFORE your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable

Court, directed to the Court of Appeals of Alabama, commanding that court to certify and send to this Court for review and determinatnon, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled, Docket No. 4243, *Byron Thornhill* v. *State of Alabama and Ex Parte Byron Thornhill*, and that the judgment of the Court of Appeals of Alabama may be reviewed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as this Honorable Court may seem meet and just; and your petitioner will ever pray.

BYRON THORNHILL,
By JAMES J. MAYFIELD,
Counsel for Petitioner.

JOSEPH A. PADWAY,
Of Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

BYRON THORNHILL,

Petitioner,

v.

THE STATE OF ALABAMA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The opinion on the Court of Appeals of Alabama is reported at 189 So. 913, Certiorari denied by the Supreme Court 189 So. 914, July 20th, 1939, Advance Sheet (Appendix "A") this petition.

II.

Jurisdiction.

1. The statutory provision is Judicial Code, Section 237-B as amended by the Acts February 13, 1925, 28 U. S. C. A. Section 344, Page 205.

2. The date of the judgment of the Court of Appeals of Alabama, is January 7th, 1939, certiorari denied by Supreme Court of Alabama, July 15, 1939. On September 12,

1939, Mr. Justice Hugo L. Black by appropriate order extended the time for filing of this petition until November 12, 1939.

3. The nature of the case and rulings below brings the case within the jurisdictional provision of Section 237-B, *supra*. Claim of Federal constitutional right was raised by demurrer at the original trial in the Inferior Court of Tuscaloosa County, Alabama, and was again raised by demurrer and by motion to exclude the State's evidence, upon a trial *de novo* had in the Circuit Court of Tuscaloosa County, Alabama, and denied. The Court of Appeals of the State of Alabama in its opinion specifically passed upon the claim of Federal right and denied the same. The question was again presented to the Supreme Court of Alabama by petition for certiorari, and the Supreme Court denied certiorari.

The Federal right claimed by the petitioner is that the Statute under which he was convicted, is upon its face as applied to him, unconstitutional in denying to him due-process of law under the *XIVth Amendment to the Constitution of the United States*. This claim is grounded upon the contention that Alabama's anti-picketing law, which prohibits picketing, even though peaceful, deprives the petitioner of freedom of speech and assemblage; and that the Court of Appeals of Alabama denied him the protection of the due-process of law clause of the XIVth Amendment, by extending the purview of the statute to the petitioner's actions on the occasion in question. The statute in question is as follows:

Section 3448, Code of Alabama, 1923.

"Loitering or Picketing Forbidden.—Any person or persons, who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for

the purpose, or with intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying or interfering with or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business."

4. The following cases among others sustain the jurisdiction:

Lovell v. *Griffin*, 303 U. S. 444;
C. I. O. v. *Hague*, 59 S. Ct. 954.

III.

Statement of the Case.

Petitioner was charged with "picketing and loitering" in a labor dispute in violation of the above statute. Petitioner's action on the occasion in question consisted of asking another employee without threats, or show of force, direct or implied, not to resume his employment in an industrial plant until a strike, then in progress, was settled (R. 9-13). The Court of Appeals held that the constitutionality of the statute was established by two previous decisions of the Supreme Court of Alabama, *Hardie-Tynes* v. *Cruise*, 189 Ala. 66, 66 So. 657, and *O'Rouke* v. *City of Birmingham*, 168 So. 206, 27 Ala. App. 133 (Appendix "B" and "C"), this petition. The Court interpreted the statute in the case at bar, as preventing any picketing whatsoever, regardless of whether or not it was peaceful and further construed the statute as preventing one worker asking another worker not to accept employment in an employer's plant.

IV.

Errors Assigned.

1. That the courts of Alabama erred in holding that *Section 3448 of the Code of Alabama, 1923, supra,* was not violative of the *XIVth Amendment to the Constitution of the United States.*

2. That the courts of Alabama deprived the petitioner of the protection of the due-process of law clause of the XIVth Amendment, by extending the purview of Section 3448, *supra,* to the petitioner's actions on the occasion in question.

Point I.

That the Alabama Anti-Picketing Statute, Section 3448 of the Code of Alabama, 1923, supra, violates the XIVth Amendment to the Constitution of the United States.

Colorado recently in *Peoples* v. *Harris,* 91 Pacific 2nd 993, held that an anti-picketing statute which is almost identical with the statute here challenged, as violative of the *XIVth Amendment to the Constitution of the United States.* The Colorado Supreme Court said, "only one other State, Alabama, has a similar statute. —, it is argued that peaceful picketing is a crime under Section 90, *supra,* (Colorado's Anti-Picketing Law). If the Legislative intent requires such a construction, then the law must under the stipulated facts, be held unconstitutional as being a denial of freedom of speech —. If this contention is upheld (that peaceful picketing is unlawful), we have what amounts to an exercise of arbitrary power in violation of the due-process of law provision contained in the XIVth Amendment".

A comparison of Section 3448 of the Code of Alabama, 1923, *supra,* and the statute which Colorado Supreme Court held to be violative of the XIVth Amendment leads one in-

escapably to the conclusion that the draftman of the Alabama Statute used the Colorado Statute as a model.

We think the fact that Colorado has decided that an almost identical statute is unconstitutional is strong argument that this Court should carefully examine the validity of the Alabama statute here presented.

This Court recently said in the case of *C. I. O.* v. *Hague*, 59 S. Ct. 985.

> "It has been explicity and repeatedly affirmed by this Court, without a dissenting voice, that freedom of speech and of assembly for any lawful purpose are rights of personal liberty secured to all persons, without regard to citizenship, by the due-process clause of the Fourteenth Amendment".

Mr. Justice Butler, in his dissenting opinion in the case of *Senn* v. *Tile Layers Union*, 57 S. Ct. at page 867, 81 L. Ed. 1229, said:

> "The right of workers, parties to a labor dispute, to strike and picket peacefully to better their condition does not infringe any right of the employer".

Yet the Alabama Court said in the *Hardie-Tynes* case, 66 So. at page 657, *supra*,

> "Perhaps our Legislature has taken the view, adopted by some of the Courts, that the actual practice there is and can be no such thing as peaceful picketing or peaceful persuasion. Certainly this is the effects of our statutes".

If that is the "effects of the statutes" then they must fall. By the express statement of the prosecuting witness in the case at bar, the petitioner's actions were entirely peaceful. There was probably never a "peaceful election", yet it would be absurd to argue that simply because elections are not peaceful that the right of citizens to discuss them is

not protected by the guarantee of freedom of speech; and that the State under the guise of its police power can restrict a citizen's right to discuss or hold elections.

In the case of *Herndon* v. *Lowry*, 301 U. S. 242, this Court said,

> "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the State. Legislation which goes beyond this need violates the principle of the Constitution".

And applicable to this situation is also the statement of Mr. Justice Holmes in *Schenck* v. *United States*, 249 U. S. 47, at page 52:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

There is certainly no question involved in this case of the safety of the State. But the right here sought to be protected by the Legislature is the employer's right to maintain the *status quo* without interference by his employees. For the Alabama courts to hold that one American workman cannot freely speak his sentiments to another American workman, concerning their mutual working conditions, is to indoctrinate our law with a philosophy foreign to English speaking people, and strike down the fundamental guarantees they have won in their Bill of Rights.

The court of Alabama, in the case of *Hardie-Tynes* v. *Cruise, supra,* further said in discussing picketing:

> "The 'liberty' guaranteed by the Constitution (article 1, paragraph 1) is liberty regulated by law and the social compact; and in order that all men may enjoy liberty it is the tritest truism to say that every man must renounce unbridled license".

To hold that peaceful discussion of working conditions is, "unbridled license", is to stretch the imagination beyond the breaking point. The rights of peaceful assembly and freedom of speech, are sacred rights wrung from despotic sovereigns, intent, on exercising "unbridled license" in the government of their subjects.

The Alabama court further said in the *Hardie-Tynes* case, *supra,*

> "If one man asserts the constitutional right of preventing another from the pursuit of a lawful business, what is to become of the undoubted constitutional right of the other to pursue his business unmolested?"

The petitioner confesses that he knows of no constitutional right that the employer has to "pursue his business unmolested", especially a right to pursue that business unmolested by reasonable, and peaceful argument, on the part of his employees, for humane treatment and a decent standard of living. As to this argument Colorado said in the case of *People* v. *Harris, supra,*

> "The mere fact that an employer may sustain loss of business as a result of such picketing does not warrant intervention. It is damnum absque injuria".

Point II.

The petition's conviction was without due-process of law in violation of his right of freedom of speech.

The Court of Appeals of Alabama in its opinion in this case (R. 20) said:

> "The evidence adduced upon the trial was sufficient to bring the appellants actions, for which he was being prosecuted, within the purview of the prohibition implied in the statute."

Are citizens to be convicted for the violation of prohibitions that are merely "implied in the statute"? If so, clearly, the courts are exercising arbitrary authority in violation of the due-process of law clause of the *XIVth Amendment*.

The criminal misconduct for which the petitioner was convicted consisted of requesting his fellow worker not to return to work until a strike was settled. Certainly there is nothing in the petitioner's action here to justify a reasonable apprehension of danger to the organized government of the State so as to admit an abridgment of freedom of speech. In *De Jonge* v. *Oregon*, 299 U. S. 363, the Chief Justice in speaking of the Legislature's right to abridge freedom of speech and assembly,

> "These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.
>
> "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly

in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

It is well settled that it is not only the interpretation of a statute which controls, but also the manner in which the statute is applied to the facts in the particular case. See *Herndon* v. *Lowry, supra.* An examination of the facts in this case and the case of *O'Rouke* v. *City of Birmingham, supra,* will show that this statute is being ruthlessly applied in Alabama to protect the economic interest of the employer against the human rights of the worker. It is regrettable that the published opinions do not contain more instances of the manner in which the statute is applied. In the vast majority of these "applications" the prisoner is unable to appeal.

Freedom of speech is a part of the political inheritance which Americans derived from the mother country; it is our birthright and it is the duty of the State to which we have delegated the right to govern us, to protect and enforce it; but only through stubborn resistance to the exercise of arbitrary power will it be preserved to us. The fact that picketing is distasteful to a group of legislators should not be warrant to them, under pretext of exercising the police power to preserve order, to abridge freedom of speech.

A mere threat of disorder cannot be seized upon as valid excuse for abridging the fundamental guarantees of the Bill of Rights. As Mr. Justice Brandeis said of the generation that included those who inserted these guarantees into the Constitution:

"Those who won our independence by revolution were not cowards. They did not fear political change. They

did not exalt order at the cost of liberty. Whitney *v.* California, 274 U. S. 357, at 377."

Summary and Conclusion.

We have undertaken to show that the Alabama Legislature in forbidding peaceful picketing has violated one of the most necessary and sacred of American rights—the right of freedom of speech.

The construction placed upon the statute by the Alabama courts is such as to deny workers the right to assemble and discuss their working conditions with their fellow workers in the vicinity of their employer's plant.

The petitioner submits that the relief prayed should be granted and the decision of the Court of Appeals reversed.

Respectfully submitted,

JAMES J. MAYFIELD,
Counsel for Petitioner.

JOSEPH A. PADWAY,
Of Counsel for Petitioner,
321 Tower Building,
Washington, D. C.

APPENDIX "A"

Thornhill v. State, 189 So. 913.

RICE, *Judge:*

Section 3448 of the Code of 1923 reads as follows: "Any person or persons, who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business."

Appellant was convicted of the offense denounced by the above Code section.

It seems clear enough that the evidence adduced upon the trial was sufficient to bring appellant's actions, for which he was being prosecuted, within the purview of the prohibition implied in said Statute.

So, as conceded by able counsel here representing appellant, "the only question involved in this appeal is the constitutionality vel non of Section 3448 of the Code of Alabama of 1923."

And, as further conceded by the said counsel, this exact question has been heretofore decided both by this court and the Supreme Court—this court of course merely following the decision by the Supreme Court, as it was required to do (Code 1923, Sec. 7318)—adversely to the contentions here urged against the validity of said Statute. See O'Rouke *v.* City of Birmingham, 27 Ala. App. 133, 168 So. 206, certiorari denied 232 Ala. 355, 168 So. 209; and Hardie-Tynes Mfg. Company *v.* Cruise et al., 189 Ala. 66, 66 So. 657.

It results, there is nothing for us to do but affirm the judgment of conviction. Code Section 7318, supra.

Which we hereby do.

Affirmed.

Certiorari Denied, 189 So. 914.

APPENDIX "B".

O'Rouke v. City of Birmingham, 168 So. 206.

——"Defendant spoke to no person, simply walking slowly and peacefully back and forth along the sidewalk immediately in front of said theatre with said sign or placard being exhibited so as to be visible to persons walking along the street near said theatre and was so conducting himself when he was arrested. At the time that the above matters transpired, there was a labor dispute in existence as said theatre had locked out union employees (stage hands) and said Ritz Theatre had just previously thereto refused to work stage hands who were members of any union affiliated with the American Federation of Labor, and at the time was working men who were not regularly employed as stage hands, in the work ordinarily being done by stage hands in violation of the National Industrial Recovery Act. At the times above referred to, Ritz Theatre was not working any person holding membership in any union affiliated with the American Federation of Labor. The purpose of the defendant's conduct, as above described, was to advise customers of said theatre and prospective customers of said theatre, of the relationship existing between the Ritz Theatre and its employees, and to influence such customers and prospective customers not to patronize said theatre on account of said theatre's failure and refusal to employ persons who were members of Labor unions affiliated with the American Federation of Labor.

"All of the above matters and things occurred within the City of Birmingham, Alabama, prior to and within 12 months prior to the commencement of the prosecution in this case."

The court adjudged the defendant guilty and pronounced and entered judgement accordingly.

As stated, the controlling question on this appeal is the validity of the statutes above quoted; it being the insistence of the appellant that these statutes, in fact the entire chapter 91 of the Code 1923, are unconstitutional, and that the conviction of this appellant thereunder cannot stand.

We have read carefully and attentively and with interest the elaborate and exhaustive briefs of respective counsel in this case, and command them for their earnestness and untiring efforts. The province of this Court is limited with reference to constitutional questions. Sections 7322 of the Code 1923 (superseding section 7310 of the Code 1923) provides, before the Court of Appeals should strike down any statute, federal or state, not previously nullified by the Supreme Court, the question involving the validity of same must be submitted to the Supreme Court for determination; the result shall be transmitted to the Court of Appeals, which said court shall be controlled in its decision by the determination of the Supreme Court. This statute also provides when a statute has been assailed upon constitutional grounds in the Court of Appeals, and is upheld by this court, the aggrieved party may review the rulings of this court in this particular by writ of error, etc. In view of the foregoing provisions, we will refrain from an extended discussion of the conclusion here entertained to the effect that the insistences of appellant to the effect that chapter 91 of the Code 1923 is unconstitutional are not well taken and cannot be sustained. So far as we are able to ascertain, the statute in question are valid enactments and the provisions of the statutes in question in no manner offend the Constitution of this state. This is our conclusion after a careful and attentive consideration of the questions, in all of their phases, has been accorded. Moreover, it appears that the Supreme Court of this state has directly held this in the case of Hardie-Tynes Mfg. Co. v. Cruise et al., 189 Ala. 66, 66 So. 657, 660. In said case, Mr. Justice Somerville, speaking for the court, said: "The English and American courts have, we believe, without exception, held that the right to conduct one's business, without the wrongful and injurious interference of others, is a valuable property right which

will be protected, if necessary, by the injunctive processes of equity."

And further in the opinion, supra, the court said: "No intimation is offered as to what provision of the Constitution is thereby offended, and we can think of none. Certain it is a right to actively and directly interfere with and prevent the operation of the lawful business of another is not included among the inalienable rights of 'life, liberty, and the pursuit of happiness'. The 'liberty' guaranteed by the Constitution (article 1, paragraph 1) is liberty regulated by law and the social compact; and in order that all men may enjoy liberty it is but the triest truism to say that every man must renounce unbridled license. So, wherever the natural rights of citizens would, if exercised without restraint, deprive other citizens of rights which are also and equally natural, such assumed rights must yield to the regulations of municipal law. If one man asserts the constitutional right of preventing another from the pursuit of a lawful business, what is to become of the undoubted constitutional right of that other to pursue his business unmolested? It is clear that this motion of liberty utterly ignores 'the other fellow,' and denies to him the very freedom it is claiming for itself."

Other cases of like import could be cited, but, for the reasons hereinabove stated, we refrain from prolonging this opinion.

We find no error in the points of decision presented. It follows that the judgment of the lower court from which this appeal was taken must be, and is, affirmed.

Affirmed.

ON REHEARING.

On application for rehearing, able counsel for appellant earnestly insist we extend our opinion in this case in the manner hereinafter discussed. This court, having no inclination to deprive the appellant of any legal right or to retard in any manner his full right of review of every pertinent question involved, therefore grants the request aforesaid and holds directly that which has already, in said opinion, been impliedly held, from the authorities cited, by which we are governed and controlled, that in overruling

the demurrers to the complaint in this cause, and the application of the provisions of chapter 91 of the Code of Alabama 1923, the trial court acted without error. We are of the opinion that the ruling complained of had no tendency to deprive the appellant of his rights, powers, privileges, and immunities as secured and guaranteed to him by the provisions of the Fourteenth Amendment to the Constitution of the United States.

Application overruled. 168 So. 209.

APPENDIX "C".

Hardie-Tynes Mfg. Co. v. Cruise et al., 66 So. 657.

(From a decree refusing an injunction to enjoin peaceful picketing, the complainant appeals.)

——The meaning and purpose of these provisions are, we think, too plain for serious discussion. Sections 6394 and 6856 are broad enough to include even the peaceful persuasion of would-be employees not to serve an employer, if its intention and effect is to prevent the operation of a lawful business. And while the courts do not undertake to enjoin the conspiracy itself, the execution of the conspiracy would be a criminal tort against the employer's property rights which may be prevented by injunction. Section 6395 is more specific in its inhibition of such forms of "peaceful interference," and expressly forbids picketing when it is done "for the purpose of interfering with or injuring any lawful business or enterprise." Perhaps our Legislature has taken the view, adopted by some of the courts, that in actual practice there is and can be no such thing as peaceful picketing or peaceful persuasion. Certainly this is the effect of our statutes.—It is suggested by counsel for respondents that our construction of Section 6395, as being an inhibition of picketing even where threats or violence are not used, renders it unconstitutional. No intimation is offered as to what provision of the Constitution is thereby offended, and we can think of none. Certain it is that a right to actively and directly interfere with and prevent the operation of the lawful business of another is not included among the inalienable rights of "life, liberty, and the pursuit of happi-

ness." The "liberty" guaranteed by the Constitution (article 1, paragraph 1) is liberty regulated by law and the social compact; and in order that all men may enjoy liberty it is but the tritest truism to say that every man must renounce unbridled license. So wherever the natural rights of citizens would, if exercised without restraint, deprive other citizens of rights which are also and equally natural, such assumed rights must yield to the regulations of municipal law. If one man asserts the constitutional right of preventing another from the pursuit of a lawful business, what is to become of the undoubted constitutional right of that other to pursue his business unmolested? It is clear that this notion of liberty utterly ignores "the other fellow", and denies to him the very freedom it is claiming for itself.—Reversed and rendered.

(4486)